STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY RAY SHEPARD, a/k/a TERRY RAY WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
September 7, 1999

No. 185242
Recorder's Court
LC No. 94-009772

Before: Hoekstra, P.J., and O'Connell and R. J. Danhof*, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction for unarmed robbery, MCL 750.530; MSA 28.798. Defendant was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to eight to twenty years' imprisonment. We affirm.

Defendant argues that the trial court erred in denying defendant's motion for new trial because the prosecutor failed to list certain res gestae witnesses on the information. The trial court's decision whether to grant a motion for new trial is reviewed for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 27; 592 NW2d 75 (1998). Defendant argues that the officers that initially responded to the alleged victim's house should have been listed on the information as res gestae witnesses. We conclude that the trial court did not abuse its discretion in denying defendant's motion for new trial.

"A res gestae witness is a person who witnesses some event in the continuum of a criminal transaction and whose testimony will aid in developing a full disclosure of the facts." *People v O'Quinn*, 185 Mich App 40, 44; 460 NW2d 264 (1990). The trial court held that the officers were not res gestae witnesses because they arrived at the scene after the crime allegedly took place. We review the trial court's determination whether a person was a res gestae witness for clear error. *People v Hatch*, 156 Mich App 265, 267; 401 NW2d 344 (1986). We conclude that the court's finding was clearly erroneous. The officers were the initial responding officers, and the evidence indicates that

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

defendant was still inside the alleged victim's home when they arrived. The officers' testimony would aid in developing a full disclosure of the facts; therefore, they were res gestae witnesses.

The prosecutor was required to attach to the information a list of all known res gestae witnesses, and, upon request, assist defendant in locating res gestae witnesses. MCL 767.40a(1) & (5); MSA 28.980(1)(1) & (5). This duty has been described by our Supreme Court as an "obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request." *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995). The purpose behind the listing requirement is merely to notify the defendant of the existence of the res gestae witnesses. *People v Calhoun*, 178 Mich App 517, 523; 444 NW2d 232 (1989). "Therefore, if the defendant knew of the res gestae witness in any event, the prosecutor's failure to list the witness would be harmless error." *Id*. Here, our review of the record leads us to conclude that the officers were not known to the prosecutor as res gestae witnesses, in which case the failure to list them on the information was not error. However, even if they were known to the prosecutor, any error resulting from the failure to list them would be harmless because defendant knew of their existence, since he was present when they arrived at the victim's house, and failed to request assistance in locating them. Therefore, the trial court did not abuse its discretion in denying defendant's motion for new trial.

Defendant also argues that the trial court erred by failing to adjourn trial so that defense counsel could contact the missing res gestae witnesses. We review the trial court's decision whether to grant a continuance for an abuse of discretion. *People v Peña*, 224 Mich App 650, 660; 569 NW2d 871 (1997), modified in part 457 Mich 883 (1998). However, because defendant did not request a continuance, no decision exists to review. Therefore, this issue is unpreserved, and our consideration is limited to whether relief is necessary to avoid manifest injustice. *Gadomski, supra* at 30. Had defendant requested a continuance and the trial court refused to grant one, defendant would be required to demonstrate prejudice in order to obtain relief. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). Because defendant knew that the witnesses existed and failed to request assistance in locating them, defendant would be unable to demonstrate prejudice from a refusal to grant a continuance. We conclude that no manifest injustice will result from our failure to grant relief on this issue.

Defendant also claims that he was denied the effective assistance of counsel. We disagree. To claim ineffective assistance of counsel, defendant "must show that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation prejudiced him so as to deprive him of a fair trial." *People v Carrick*, 220 Mich App 17, 22; 558 NW2d 242 (1996). Also, defendant "must show that, but for the error, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable." *Id*. Defendant raises numerous different claims of ineffective assistance of counsel. However, our review of each claim leads us to conclude that none affected the result of the proceedings against defendant.

Defendant contends that trial counsel was ineffective in allowing defendant to be tried in front of a judge that presided over defendant's motions to quash the information and suppress evidence of his prior convictions, thereby allowing the trial court to be privy to testimony that was not introduced at trial and defendant's inadmissible prior convictions. However, defendant failed to demonstrate that the

outcome of the proceedings would have been different. Although a trial court sitting as the trier of fact may not refer to the preliminary examination transcript, *People v Ramsey*, 385 Mich 221, 225; 187 NW2d 887 (1971), this rule is not violated where the trial court did not read the transcript while sitting as the trier of fact but while deciding whether to grant the defendant's motion to quash. *People v Dixson*, 403 Mich 106, 109; 267 NW2d 423 (1978). In *Ramsey*, the Court was concerned about its inability to determine how much of the transcript was read and for what purpose. *Ramsey*, *supra* at 225. Where the court reviews the transcript in order to rule on a motion to quash, those concerns are not present. With regard to the court's knowledge of defendant's inadmissible prior convictions, we note that if the prosecutor had improperly attempted to introduce evidence of those convictions during trial, the court would be presumed to understand the difference between admissible and inadmissible evidence. *In re Forfeiture of $19,250*, 209 Mich App 20, 31; 530 NW2d 759 (1995). Similarly, we note that if inadmissible evidence were referred to during a jury trial, a curative instruction to the jury to disregard the evidence might eliminate the prejudicial effect of the reference. *People v Holliday*, 144 Mich App 560, 570; 376 NW2d 154 (1985). A trial judge acting as the trier of fact is therefore certainly capable of disregarding inadmissible evidence. Defendant's argument would lead to the conclusion that trial counsel would be ineffective for allowing a bench trial before the same judge that presided over routine pretrial motions. We reject this argument. Defendant has not shown ineffective assistance of counsel on the basis of the trial court's knowledge of preliminary examination testimony and suppressed prior convictions.

Defendant also contends that trial counsel was ineffective in failing to secure the presence at trial of the officers who initially responded to the victim's house. These officers testified at the evidentiary hearing on defendant's motion for new trial. Their testimony indicates that they were unaware that any crime had occurred, believing it to be a civil dispute over money, and that they instructed defendant to leave the house and did not search him. Our review of this testimony leads us to conclude, as did the trial court, that it would not have affected the outcome of defendant's trial. Defendant also claims that trial counsel was ineffective in failing to challenge the competency of one of the witnesses. The trial court considered this witness's apparent problems with perception in deciding the appropriate weight to be given to his testimony. The weight and credibility of a witness is for the trier of fact to determine. *People v Chavies*, 234 Mich App 274, 290; 593 NW2d 655 (1999). Defendant has failed to demonstrate that the outcome of the trial would have been affected had defense counsel more aggressively attacked this witness's credibility or competency.

Defendant's remaining claims that trial counsel was ineffective are similarly unpersuasive. Defendant alleges that counsel failed to introduce the preliminary examination testimony of the victim, failed to secure a recording of the telephone call that defendant's mother made to the police, failed to object to the prosecutor's questions about defendant's driver's license being left at the victim's house, failed to visit defendant in jail, and failed to call defendant's mother to testify. However, defendant failed to demonstrate that he was prejudiced by these alleged failures of trial counsel.

Next, defendant claims that the trial court erred in failing to disqualify itself from hearing defendant's motion for new trial. We review the trial court's factual findings regarding a motion for disqualification for an abuse of discretion. *FMB-First Mich Bank v Bailey*, 232 Mich App 711, 727-

728; 591 NW2d 676 (1998). However, we review the application of those facts to the law de novo. *Id*. at 728 We conclude that the trial court did not err in denying defendant's motion for disqualification.

Defendant argues that the trial court should have been disqualified because defendant sent numerous letters to the court, some of which were threatening, and filed a grievance against the court with the Judicial Tenure Commission. Defendant argues that in response to his actions, the court ordered competency testing on defendant and asked to be informed if defendant were released from jail. Also, defendant argues that the court should have been disqualified because it presided over defendant's motions to quash the information and suppress evidence of prior convictions.

MCR 2.003(B)(1) provides that a trial judge may be disqualified on grounds of personal bias or prejudice. Actual bias or prejudice must be shown. *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996). A party challenging a judge on this basis "must overcome a heavy presumption of judicial impartiality." *Id*. at 497. In the present case, defendant has not shown actual prejudice. As noted above, the court did not act improperly in reviewing the preliminary examination transcript because it was not acting as the trier of fact when it was ruling on defendant's motion to quash. Also, the court was not biased merely because it knew of defendant's inadmissible prior convictions. The court did not indicate that it considered those convictions during trial. With regard to defendant's claims that the court was biased because it became personally embroiled with defendant, we disagree. The court's statements on the record indicate that it was not shocked by defendant's conduct and had experienced such conduct before while on the bench. To allow a defendant to disqualify a trial judge on the basis of that defendant's threats to and harassment of the judge would promote judge-shopping. Defendant has not shown actual bias or prejudice, and we accordingly find no error.

Defendant raises further issues in propria persona, claiming that the prosecutor deliberately withheld exculpatory evidence from defendant, that defendant was coerced into waiving his right to a jury trial and withdrawing his first motion to disqualify the trial judge, that the prosecutor improperly introduced inflammatory evidence against defendant, and that the evidence was insufficient to support a finding a guilt beyond a reasonable doubt. We find no merit to these claims. The record does not indicate, and defendant has not demonstrated, that any exculpatory evidence was deliberately withheld from him. Further, the record clearly reflects that defendant voluntarily waived his right to a jury trial and voluntarily withdrew his motion for disqualification. The court expressly asked defendant whether anyone had pressured him or made any promises to him, and defendant informed the court that no one had done so. Additionally, defendant failed to preserve his claims of prosecutorial misconduct by objecting to the alleged misconduct at trial. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We also conclude that the evidence, when viewed in the light most favorable to the prosecutor, was sufficient to support defendant's conviction. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified 441 Mich 1201 (1992).

Although not raised by the parties, we note that the judgment of sentence contains an incorrect statutory citation for defendant's habitual offender sentence. The judgment of sentence indicates an enhanced sentence under MCL 769.13; MSA 28.1085, which sets forth various procedural requirements for imposing an habitual offender sentence, instead of MCL 769.12; MSA 28.1084,

which provides for enhanced sentencing for habitual offender, fourth offense. Accordingly, we direct the trial court to correct the judgment of sentence. *People v Avant*, 235 Mich App 499, 521; ___ NW2d ___ (1999). See also MCR 7.216(A)(1); MCR 6.435(A).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell
/s/ Robert J. Danhof